DOCKET FILE COPY ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON DC 20554

RECEIVED
AUG 20 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Annual Assessment of the	)	
Status of Competition in the	)	
Markets for the Delivery of Video	)	
Programming	)	
	)	**CS Docket No. 97-141**
	)	
	)	

REPLY COMMENTS OF VIACOM INC.

1. The FCC has requested comments on the status of competition in the markets for the delivery of video programming as required by the Communications Act of 1934, as amended, 47 USC §548(g). Viacom Inc. ("Viacom") respectfully submits the following reply comments with respect to this matter. Viacom's satellite cable programming services are neither affiliated nor vertically integrated with cable systems or common carriers providing video services directly to subscribers.[1] Viacom restricts its comments to the issue of program access and the suggestion made by several commentors that the Commission recommend to Congress expansion of the access requirements to satellite cable programming vendors which are not vertically integrated with a cable operator or common carrier providing video programming.

---

[1] Viacom, through affiliates, owns and operates: the premium program services Showtime, The Movie Channel and FLIX; and the basic program services Nickelodeon (comprising the Nickelodeon and Nick at Nite programming blocks); MTV: Music Television; VH1/Music First; Nick at Nite's TV Land; and M2: Music Television. Viacom holds a partnership interest in Sundance Channel. Viacom also, through affiliates, holds partnership interests in USA Network, the Sci-Fi Channel and All News Channel. Additionally, in partnership with a Time Warner affiliate, Viacom holds an interest in Comedy Central. Viacom is also the licensee of 11 television stations, 10 of which are affiliated with the United Paramount Network ("UPN"). Viacom is a 50% owner of UPN, an emerging broadcast television network

No. of Copies rec'd 0+4
List ABCDE

2. The program access provisions of the Communications Act and the regulations implementing them[2] generally require vertically integrated programmers to make their satellite-delivered programming services available to all MVPDs on a non-discriminatory basis. The rules generally preclude cable-exclusive distribution by such vertically integrated program services.[3]

3. As a non-vertically integrated satellite cable programming vendor to which 47 USC §548 does not apply, Viacom has no direct interest in the enforcement of the program access provisions of the Communications Act. However, a number of commentors[4] urge the Commission to recommend to Congress that the program access rules be sweepingly extended across-the-board to cover all non-vertically integrated programmers, including Viacom. In their comments the Wireless Cable Association International, Inc. ("WCA") and BellSouth Corporation ("BellSouth") are exercised about the possible future effect of several specific and recently announced joint ventures not subject to the program access rules.[5] These commentors leapfrog from the specific situations which concern them to a remedial recommendation of a global nature that would apply to all programmers, including independent programmers, such as Viacom, which are not participants in these ventures. The Small Business Cable Association ("SBCA") similarly focuses its attention principally on those programmers that are becoming vertically integrated with DBS operators.[6] Some commentors call for universal application of the rules despite the fact that their express concerns involve access to very specific types of

---

[2] 47 CFR §76.1000 et. seq.

[3] 47 CFR §76.1003

[4] See, comments of DIRECTV, Inc. at 6; Small Business Cable Association at 15; BellSouth Corporation at 10; Ameritech New Media, Inc. at 14; Wireless Cable Association International, Inc. at 13; Joint Comments of Bell Atlantic companies and NYNEX telephone companies at 2

programming. For example, DIRECTV, while citing the same concerns of WCA and BellSouth, focuses its primary attention on the availability of sports programming.[7] Bell Atlantic/NYNEX in their joint comments are concerned with access only to certain "key programming", albeit undefined and unspecified, which may in the future be delivered terrestrially rather than by satellite (and would therefore no longer be subject to the access rules)[8]. Ameritech alone articulates its concerns more broadly with respect to all programming.[9]

4. As more fully discussed below, these commentors call for remedial action with respect to matters which need no remedy. Indeed, WCA characterizes its request as a prophylactic response to possible developments that have yet to emerge,[10] and, indeed, may never emerge. The regulations suggested would replace accepted, proven, valuable, time-tested and appropriate free-market activity wherein programming vendors flexibly and creatively negotiate the terms and conditions of their contractual relationships. The capability to freely deal with customers, including even the capacity to deal on an exclusive basis, reflects the natural functioning of the programming marketplace which, as has been acknowledged by the FCC, is not to be discouraged in the absence of "the unique situation" of vertical integration.[11] The Commission has further observed that:

> . . .exclusivity under [Section 628(c)(2)(D) of the 1992 Cable Act] is not prohibited. As a general matter, the public interest in exclusivity

---

[7] Comments of DIRECTV at 5

[8] Comments of Bell Atlantic/NYNEX at 2

[9] Comments of Ameritech New Media at 14-16

[10] Comments of WCA at 13

[11] In the Matter of Implementation of Sections 12 and 19 of The Cable Television Consumer Protection and Competition Act 1992, MM Docket No. 92-265, (April 30, 1993), at par. 63

> in the sale of entertainment programming is widely acknowledged.[12]

Indeed, the FCC has determined particularly with respect to new programming that even where vertical integration exists, there may well be circumstances in which exclusivity is appropriate.[13] Consequently, it is an accepted view that in the proper context exclusivity is competitively appropriate and beneficial. The statutory and regulatory prohibitions against certain exclusive arrangements (i.e., those generally entered into by vertically integrated program networks) constitute a clear and precisely targeted exception to the general proposition that free market arrangements represent an economically efficient, pro-competitive means for the distribution of programming. Commentors who would extend that targeted and specific exception to the entire satellite cable programming industry must provide a legitimate justification for their position, supported by a reasonable degree of specificity evidencing the need for their proposed remedy. These commentors have failed to meet this burden.

5. As justification for denying non-vertically integrated programmers the latitude to freely market their services, proponents of increased regulation recite their fears concerning an increased pace of horizontal and vertical integration in the multichannel video distribution business. For example, BellSouth suggests in its comments that ". . . since cable programming services cannot succeed unless they are able to reach a critical mass of subscribers, they will. . . be. . . beholden to large MSOs."[14] However, for a remedy these commentors propose that the government extend the perceived market power of cable systems vis-a-vis programmers to themselves, asking that the terms and conditions cable operators have historically been able to

---

[12] Id.

[13] Id, at par. 65

[14] Comments of BellSouth at 12

obtain from programmers in the absence of competition should, without justification - and irrespective of vertical integration - be extended to all competing distributors, depriving programmers of the benefits of that very competition. If competitive MVPDs can not otherwise obtain dominance over programmers through their own efforts, they'll gladly do so through governmental fiat.

6. Cable operators could reasonably be expected on occasion to distinguish themselves from their MVPD competitors through exclusive, differentiated and unique programming. Precisely because of the market position of terrestrial cable delivery systems, programmers need these large and efficient cable distribution vehicles to ensure the success of new programming ventures, which are inherently risky. Yet, if independent programmers were to be precluded from offering exclusive arrangements, especially for the distribution of new networks, cable operators would often be reluctant to distribute new, unproven programming because without exclusivity they assume the risk of their competitors' engaging in "free-riding", i.e., exploiting the cable operator's marketing efforts when it is those same operators who risk the investment of scarce channel space, money, time, and resources in promoting the new network. Even when cable operators are willing to carry a new programming service in the absence of exclusivity, they tend not to expend the same level of promotional effort and funding that they would otherwise devote to the inevitability of others free-riding on their efforts and expenditures. This lack of promotional support in turn impedes the development of new, risky, costly, and innovative programming by independent programmers to the detriment of diversity, the public interest and consumers.

7. Universal application of the program access rules not only adversely affects the development and roll-out of new networks by established programmers. The extent that new

distributors in competition with cable can, by government mandate, rely on forced, assured access to the programming product of others, their own incentives to develop unique, differentiated programming are directly and immeasurably diminished. New distributors such as telephone companies and their consortiums will fail to devote resources to program development, contrary to the recognized and accepted public policy goal of creating incentives to increase program diversity. Indeed, the telephone company programming consortium known as Tele-TV has already disbanded, and its counterpart, Americast, has recently and significantly curtailed its operations, terminating many employees engaged in program development.[15]

8. It would be singularly inequitable, unfair and ironic indeed if regulators were to statutorily mandate distribution and the terms and conditions of that distribution from a company such as Viacom which has historically licensed and continues to license its programming across technologies and to competitors of cable. By virtue of the broad licensing of its branded and desirable programming, Viacom has been instrumental in helping to establish the very competitors to cable who are now calling for proscriptions on Viacom's marketing activities. Viacom continues to offer its established networks on a non-exclusive basis, even in the absence of a statutory requirement to do so. Showtime, The Movie Channel, FLIX, and Sundance Channel (licensed by Viacom's subsidiary, Showtime Networks Inc. ("SNI")); and MTV: Music Television, VH1 and Nickelodeon (licensed by Viacom's MTV Networks ("MTVN")) are all distributed not only by Ku-band DTH services, but also by a wide array of terrestrial and satellite competitors to traditional cable MSOs including telco overbuilders and MMDS, SMATV, and TVRO systems. Indeed, a significant portion of both of SNI's and MTVN's recent subscriber growth is attributable to MVPDs in competition with cable. Nevertheless, certain of the MVPD

---

[15] See, Communications Daily, Aug. 11, 1997 at 6; Daily Variety, July 28, 1977 at 8.

customers of Viacom would now have Congress circumscribe Viacom's ability, with respect to newly established and therefore more economically vulnerable programming to react to some of the ever-changing market conditions (which Viacom has itself helped to foster by virtue of its extensive licensing of its programming services). These commentors would preclude Viacom from having the option to enter into exclusive distribution arrangements on an arms-length basis for its new and yet-to-be widely distributed networks, such as Nick at Nite's TV Land, even though it is in the interests of the network, and, ultimately, the public, to do so. Viacom indeed has entered into a few exclusive, short-term distribution agreements in exchange for specific contractual obligations by the distributors to provide TV Land with guaranteed minimum numbers of subscribers over the course of the contract period. Even in light of this limited, terrestrial-only and geographically circumscribed exclusivity, TV Land is nevertheless distributed nationwide on DBS platforms.

9. Moreover, those commentors who call for increased regulation lose sight of the fact that the Commission has already offered recourse of the nature they are requesting. The FCC has stated that the general prohibition of 47 USC §548(b) against unfair practices applies not only to vertically integrated satellite programming vendors but to all cable operators, irrespective of vertical integration.[16] Section 76.1001 of the FCC rules[17] implementing the general statutory prohibitions against unfair practices by cable operators precludes anti-competitive activity, the purpose or effect of which is to prevent or hinder significantly any multichannel video programming distributor competitive with cable from providing programming to consumers. To Viacom's knowledge, this provision has never been invoked by

---

[16] See, In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 (April 1, 1993 at par. 29)

[17] 47 CFR § 1001

any MVPD. The dearth of litigation speaks volumes as to whether an issue needing to be addressed in fact exists.

10. The foregoing discussion focuses on the issue of program access generally. However, with respect to Viacom's own programming services in particular, several commentors complain that they have been unsuccessful in obtaining distribution rights to TV Land[18] or, in the case of the National Cable Television Cooperative ("NCTC"), to the USA Network[19] (in which Viacom holds a 50% interest but has no day-to-day management control). The implication is that these services are being withheld for anti-competitive reasons and that their absence on the complainants' distribution systems preclude their effectively competing with cable systems which may distribute this programming. With respect to new services such as TV Land, the Commission in its Report and Order implementing the program access rules expressly acknowledges the propriety of exclusivity for such new networks.[20] Moreover, the truth of the matter is that TV Land and USA Network as well are distributed across technologies (including national, ubiquitous distribution by DBS). The fact that these two services may not be available to particular distributors in particular geographic locations is not of importance in the context of the program access rules, which are intended to aid competition, not any particular competitor. It is noted that in the case of the NCTC's complaint about USA Network, the SBCA does not acknowledge in its pleading that specific and legitimate contractual concerns exist or the fact that USA Networks has licensed the Sci-Fi Channel - and that Viacom has licensed its other services - requested by NCTC for distribution. SBCA is also silent about the fact that USA Networks has recently extended an existing agreement with the NCTC for its distribution of the Sci-Fi Channel

---

[18] See comments of BellSouth at p. 12 and Ameritech New Media at pp. 14-15

[19] See comments of SBCA at p. 14 with respect to the NCTC

[20] See, ftnt. 11, supra. at par. 65

and that, with respect to that extension, USA Networks has even accepted NCTC's refusal to agree to certain contractual prerequisites otherwise typically required by USA Networks because in the particular context of the Sci-Fi Channel agreement, these contractual concessions are, in the view of USA Networks, deemed appropriate.

11. Viacom notes one final issue addressed by some of those who would extend the program access rules. Their narrow focus and lack of perspective is evidenced by the manner in which they simply ignore the legitimate business needs of independent programmers. While on the one hand these commentors seek forced access to all programming, they simultaneously seek in these very same comments to obtain statutory insulation from negotiating the carriage of multiple channels of programming on a packaged and discounted basis if that should be the preference of the programmer. These MVPDs want the right to set the framework for negotiation on their own terms and retain an unfettered option to buy what they want, how they want it, in order to maximize their own business opportunities. While they complain that access to each and every programming network is vital and essential to their competitive viability, they at the same time acknowledge that they in fact do not need access to all programming if it becomes an issue that, as a bargaining matter, is put on the table by programmers in an attempt to efficiently package and price multiple channels of programming. The inconsistency by these commentors is manifest. It accentuates the fact that what this debate is really about is self-interest, devoid of balanced and reasonable public policy concerns which address the legitimate needs of programmers.

12. For the foregoing reasons, Viacom respectfully requests that the Commission decline to recommend to Congress that the provisions of 47 USC §548 be extended to apply to non-vertically integrated satellite cable programming vendors. Viacom further suggests that it is

in fact time for the Commission to bring closure to this issue which has been raised repeatedly over the last four years including (among other proceedings) each time the Commission issues its annual inquiry with respect to the state of competition in the markets for the delivery of video programming. Viacom therefore respectfully requests that the Commission not only reject the call for extension of program access but instead recommend to Congress that 47 USC §548 should not be extended to non-vertically integrated vendors of satellite cable programming.

Viacom Inc.

By: Edward Schor

Edward Schor, its Attorney
1515 Broadway
New York, NY 10036

August 20, 1997

CERTIFICATE OF SERVICE

I, Eve Peña, hereby certify that on this 20th day of August, 1997, I caused copies of the foregoing Reply Comments of Viacom Inc." to be mailed via first-class postage prepaid mail to the following:

William B. Barfield
Thompson T. Rawls, II
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GE 30309

Counsel for BellSouth Corporation

Lawrence R. Sidman
Jessica A. Wallace
Verner, Liipfert, Bernhard, McPherson
& Hand, Chtd.
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

Counsel for Ameritech New Media, Inc.

James H. Barker
Gary M. Epstein
Nandan M. Joshi
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505

Counsel for DIRECTV, Inc.

Paul J. Sinderbrand
Robert D. Primosch
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, N.W.
Suite 600
Washington, DC 20006

Counsel for The Wireless Cable Association International, Inc.

Eric E. Breisach
Christopher C. Cinnamon
Kim D. Crooks
Howard & Howard
107 W. Michigan Ave., Suite 400
Kalamazoo, MI 49007

Counsel for the Small Cable Business Association

Leslie A. Vial
Bell Atlantic Companies
1320 North Courthouse Road
8th Floor
Arlington, VA 22201

Deborah H. Morris
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800
Chicago, IL 60606

Richard G. Warren
NYNEX Telephone Companies
1095 Avenue of the Americas
Room 3831
New York, NY 10036